Supreme Court, U.S.
FILED
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No. 99 711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JOSE ORTIZ; AIDA ORTIZ,
Petitioners,

vs.

COUNTY OF LOS ANGELES; SHERMAN BLOCK, Sheriff;
TERRY BOWER; D. MOORE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Is a remand proper under *Wilson v. Layne*, _____ U.S. _____ (1999) to determine whether the warrantless felony arrest of Petitioner Jose Ortiz and the seizure of Petitioners' vehicle exceeded the scope of consent given the officers to enter Petitioners' residence?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioners Jose and Aida Ortiz ("Petitioners") and Respondents County of Los Angeles, Sherman Block, Sheriff, Terry Bower and D. Moore ("Respondents"). All the parties are individuals except for the County of Los Angeles and Sheriff Sherman Block (now deceased) who is sued in his representative capacity on behalf of the County of Los Angeles.

Generoso Morales and Aida Morales who were Plaintiffs and Appellants to the lower court proceedings are not parties to these proceedings.

Larry Mayfield, Gil Garcetti, District Attorney for the County of Los Angeles and Walden Environment, Inc., who were Defendants and Appellees in the lower court proceedings are not parties to these proceedings.

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OPINIONS BELOW

The Order by the United States District Court for Summary Judgment Granting Defendants' Motions in *Jose Ortiz, Aida Ortiz, et al. v. County of Los Angeles, et al.* (C.D. Cal.) was entered on September 4, 1997 and is unreported (the "District Court Order") (App. C). The Memorandum Decision of the United States Court of Appeals for the Ninth Circuit affirming the District Court Order was entered on June 16, 1999 (the "Ninth Circuit Decision") (App. A). The Order by the United States Court of Appeals for the Ninth Circuit denying a Petition for Rehearing of the Ninth Circuit Decision was entered on July 27, 1999 (the "Ninth Circuit Order") (App. B).

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on June 16, 1999 and the Ninth Circuit Order denying a Petition for Rehearing was entered on July 27, 1999 (App. B). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the United States Constitution is set forth below:

Section 1 of the Klu Klux Act of 1871, Rev.Stat. 21979, as amended, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state .... Subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress ....

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, Section 1 states in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, with-

> out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Penal Code § 1533 states in pertinent part:

> Upon a showing of good cause, the magistrate may, in his *or her* discretion, insert a direction in a search warrant that it may be served at any time of the day or night. In the absence of such a direction, the warrant shall be served only between the hours of 7 * * * a.m. and 10 * * * p.m.
>
> *When establishing "good cause" under this section, the magistrate shall consider the safety of the peace officers serving the warrant and the safety of the public as a valid basis for nighttime endorsements.* (Amended by Stats. 1986, c. 257, § 1.)

STATEMENT OF THE CASE

This petition arises in the context of a civil rights action brought by Petitioners against Respondents under 42 U.S.C. §1983. Petitioners claim that Respondents violated their rights under the Fourth and Fourteenth Amendments of the United States Constitution when, on February 14, 1994, Respondents arrested Petitioner Jose Ortiz at his home at approximately midnight without a warrant or an applicable exception to the warrant requirement and at the same time, pursuant to the warrantless arrest seized the Petitioners' vehicle which was

not in plain view.

Facts.

On December 1, 1994, Walden Environment, Inc. ("Walden"), placed a fourteen-year-old child named Diane Naranjo ("Naranjo") in a certified family home owned and operated by Generoso Morales and Aida Morales ("Morales"). The Moraleses are the parents of Petitioner Aida Ortiz who is married to Petitioner Jose Ortiz.

On February 14, 1995, the Los Angeles County Sheriff's Deputy Tania Bower received a call to respond to the Antelope Valley Hospital Emergency Room in Lancaster, California regarding allegations of sexual crimes made by Naranjo. Naranjo alleged that she had been sexually assaulted by Jose Ortiz.

After Tania Bower interviewed Naranjo and a nurse at the emergency room examined Naranjo, Tania Bower contacted Respondent Deputy David Moore, who was working a patrol vehicle in the City of Palmdale, California and instructed Moore to go to Jose Ortiz's residence, take him into custody, and impound his automobile.

Moore then went to the Petitioners' residence, where he was met by Deputy David Bower ("Bower") and Sergeant Richard Gurr ("Gurr"). The time at which the officers arrived was approximately midnight.[1]

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[1] The District Court Order states that the time at which the officers arrived is not entirely clear, stating that Petitioners' own evidence is unclear. Aida Ortiz's declaration submitted in opposition to Respondents' Motion for Summary Judgment states that it (continued)

Aida Ortiz answered the door, and Moore, David Bower and Gurr then entered the Petitioners' residence.

The parties do not dispute that the entry was with Aida Ortiz's consent, but they do dispute the scope of that consent. (App. C at 7, n. 9 and C at 23-24.) Aida Ortiz contends that she only consented to the officers' entry into the residence for the purposes of speaking with Jose Ortiz, and not for the purpose of arresting him and further declared that she was never told by the officers that they were coming to arrest Israel Ortiz and did not consent to allow them to enter to arrest her husband. (App. C at 24 and App. D at 8.)[2]

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was 11:30 a.m., while Jose Ortiz's declaration states that it was 11:30 p.m. However, the District Court Order did note that other statements in the Petitioners' declarations suggested that the officers arrived at night. (App. C at 6-7, n. 8).

Aida Ortiz's declaration stating that the officers arrived at 11:30 a.m. is a typographical error. In addition to the other statements contained in Petitioners' declarations indicating that the officers arrived at night, is a declaration submitted by Deputy Moor in support of Respondents' Motion for Summary Judgment clearly stating that the arrest of Jose Ortiz and the seizure of the vehicle occurred on the evening of February 14, 1995. (App. D at 2.)

The respective declarations of Jose Ortiz, Aida Ortiz and Deputy David Moore are attached to the Appendix for the purposes of clarifying this point. (App. D.)

[2] The District Court Order notes that Moore testified in his deposition that while he could not recall the exact words he used when Aida Ortiz answered the door, he did state that "we were there to arrest Mr. Ortiz or words to that effect." (App. C at 24.)

In fact, Moore's testimony on this point is at best vague and ambiguous. In his declaration in support of the motion for summary judgment, Moore states that when Aida Ortiz answered the

(continued)

It is undisputed that Jose Ortiz was in the residence and sleeping, was then arrested by Moore. It is also undisputed that David Bower searched and seized the Petitioners' automobile that was not in plain view but was in a garage.

Jose Ortiz was taken by Moore to the Antelope Valley Sheriff's station and booked and subsequently charged by the Los Angeles County District Attorney's Office for three felony counts on February 16, 1995.

In early October 1995, at the request of the District Attorney's Office, Detective Larry Mayfield ("Mayfield") interviewed Naranjo, and submitted information he obtained to the District Attorney's Office. At some subsequent point in October 1995, the criminal case against Jose Ortiz was dismissed by the District Attorney's Office based on the information submitted by Mayfield.

Proceedings Below.

On February 14, 1996, Petitioners filed a 42 U.S.C. § 1983 action against Respondents for violation of their civil rights. The Respondents filed an Answer

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door, he "asked if Mr. Ortiz was home and she indicated that he was and invited us into their home. Our entry was through consent of Mrs. Ortiz." (App. D at 2.) There is no indication as to the substance of the conversation with Mrs. Ortiz at the time of entry. At other places in his deposition testimony, he could not recall the exact words of his conversation with Mrs. Ortiz.

Nevertheless, for purposes of a motion for summary judgment, since Petitioners are the non-moving parties, their declarations are taken as true and all justifiable inferences are made on their behalf. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986).

to Petitioners' Complaint on November 21, 1996.

On July 21, 1997, after the parties completed discovery, Respondents filed a motion for summary judgment. On September 2, 1997, the District Court granted Respondents' Motion and on October 1, 1997 Petitioners filed a timely appeal to the United States Court of Appeals to the Ninth Circuit from the Order and Judgment granting Respondents' Motion.

On June 16, 1999, the Ninth Circuit Decision was entered affirming the District Court Order. Petitioners then filed a Petition for Rehearing with the panel that rendered the Ninth Circuit Decision, which was denied on July 27, 1999. This petition for a writ of certiorari is being filed within 90 days of entry of denial of the Ninth Circuit Order denying a petition for rehearing.

REASONS FOR GRANTING THE WRIT

In concluding that there was no Fourth Amendment violation in the arrest of Jose Ortiz and the seizure of Petitioners' vehicle, the Ninth Circuit Decision found that Aida Ortiz consented to the initial entry into her residence, and therefore, even absent a warrant the actions were constitutional.

Last term the Court decided *Wilson v. Layne*, _____ U.S. _____, 119 S.Ct. 1692 (1999), and in evaluating the underlying claim of qualified immunity unanimously reaffirmed a basic principle in Fourth Amendment analysis that even when the initial intrusion by law enforcement to enter a dwelling is authorized "'[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more.'"

Id. at 119 S.Ct. 1697 (quoting *Horton v. California*, 496 U.S. 128, 140 (1990)).

The *Wilson* decision was issued several weeks before oral argument in this case. Upon learning of the Court's ruling, Petitioners promptly notified the Ninth Circuit Panel by way of a Federal Rule of Civil Procedure 28(j) letter. At oral argument, Petitioners once again raised *Wilson* in relation to the issue of the scope of consent given by Aida Ortiz to enter Petitioners' residence.

The Ninth Circuit Decision is devoid of any discussion of the scope of consent issue authorizing the officers' initial intrusion into the Petitioners' residence.[3]

The Court has previously stated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, *United States v. United States District Court*, 407 U.S. 297, 313 (1972), and has long recognized as "a 'basic principle of Fourth Amendment law [i]' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980); *Coolidge v. New Hampshire*, 403 U.S. 443, 474-475 (1971) ("a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show ... the presence of 'exigent circumstances'"); *Michigan v. Clifford*, 464 U.S. 287, 296-297 (1984) (plurality opinion); *Boyd v. United States*, 116 U.S. 616, 630 (1886); *McDonald v. United States*, 335 U.S. 451, 456 (1948); *Steagold v. United States*, 451 U.S.

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[3] After the Ninth Circuit Decision was rendered, a Petition for Rehearing was filed urging the Ninth Circuit Panel to reconsider the consent issue in light of *Wilson*.

204, 211-212 (1981).

As the Court emphasized in *Wilson*:

> In *Payton* [citation omitted], we noted that although clear in its protection of the home, the common-law tradition at the time of drafting of the Fourth Amendment was ambivalent on the question of whether police could enter a home without a warrant. We were ultimately persuaded that the 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic' meant that absent a warrant or exigent circumstances, police could not enter a home to make an arrest. *Id.* at 119 S.Ct. 1697.

The case at bar implicates the same fundamental values basic to the protections of the Fourth Amendment and "embedded in our traditions since the origins of the Republic"; a warrantless arrest of Petitioner Ortiz in his home at approximately midnight.

The Court has also declined to consider the scope of any exception to the warrant requirement that might justify warrantless arrests, thereby leaving to the lower courts the initial application of the exception, *Payton*, 445 U.S. at 583, having emphasized in prior decisions that exceptions to the warrant requirement are "few in number and carefully delineated," *United States District Court*, 407 U.S. at 318, and that the police bear a heavy burden when attempting to justify warrantless searches or arrests. *See also Thompson v. Louisiana*, 469 U.S. 17, 23 (1984) (*per curiam*) ("the issue of consent is ordinarily a factual one unsuitable for our consideration in the first

instance").

Furthermore, in *Wilson*, the Court stated that while not "[e]very police action while inside a home must be explicitly authorized by the text of the warrant, [citation omitted], the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion. [Citations omitted.]" *Id.* at 119 S.Ct. 1698.

In the case at bar, the police actions were not related to the objectives of the authorized intrusion. The consent in this case only authorized the police entry to speak to Jose Ortiz, not to arrest him.

There should be heightened concern about the reasonableness of the police actions since the arrest and seizure occurred at approximately midnight.

While the language of the Fourth Amendment explicitly sets out the requirements for a valid warrant, there is, however, no specific provision on the time of day during which the warrant must be executed. Nevertheless, the provision must be "construed in the light of what was deemed an unreasonable search and seizure when it was adopted." *Carroll v. United States*, 267 U.S. 132, 149 (1925).

At common law, prior to the adoption of the Bill of Rights, there was a strong aversion to nighttime searches. *See United States ex rel Boyance v. Myers*, 398 F.2d 896, 897-898 (3rd Cir. 1968) and authority cited therein.

During the early years of the Republic, this common law tradition was embodied in two statutes passed by the First Congress that authorized only daytime searches. Act of July 31, 1789, 224, 1 Stat. 43; Act of March 3, 1791, 229, 1 Stat. 206. Thereafter, consistent with this common-law tradition and the

original Congressional enactments referred to above, both Federal Rules of Criminal Procedures, Rule 41(c), and at least 23 states, including California, have adopted by state statute or court rule the restriction that search warrants be executed during daytime hours, absent some special showing and authorization by an independent magistrate. *See* Wayne R. Lafave, *Search and Seizure, A Treatise on the Fourth Amendment*, Third Edition, 24.7(b) (1996).

The Court has also consistently recognized that the intrusion upon privacy engendered by a search of a residence at night is of an order of magnitude greater than that produced by an ordinary search.

Justice Harlan observed in holding a nighttime search unconstitutional in *Jones v. United States*, 357 U.S. 493, 498 (1958):

> [I]t is difficult to imagine a more severe invasion of privacy than the nighttime intrusion into a private home.

Justice Frankfurter stated in *Monroe v. Pope*, 365 U.S. 167, 210 (1961):

> Searches of the dwelling house were the special object of this universal condemnation of official intrusion. Night-time search was the evil in its most obnoxious form.

See also Coolidge, 403 U.S. at 477 (the Court again recognized that a midnight entry into a home was an "extremely serious intrusion".)

California Penal Code § 1533 also limits the discretion of police officers in executing a search warrant to the hours of 7 a.m. and 10 p.m., absent a direction in the warrant that it may be served at any time of the day or night. This requires that an independent magistrate

determine, upon a showing of "good cause," that the warrant may be served in such a manner. In determining "good cause" authorizing a nighttime search, the magistrate must consider the safety of peace officers serving the warrant and the safety of the public.

Aida Ortiz stated in her declaration that she was particularly startled when, after she authorized the police entry into the residence, the officers pulled their guns out of their holsters and proceeded to their bedroom. (App. D at 8.)

Jose Ortiz was sleeping at that time and such unauthorized police actions could well have placed him and his family at considerable risk. (App. D at 5.) Since this case does not involve exigent circumstances, in the absence of an independent magistrate authorizing a warrant for Mr. Ortiz's arrest a night, the right of Petitioners to a determination of the scope of consent should be zealously protected.

Since the Ninth Circuit Decision did not consider the issue, a remand would appear to be appropriate under *Wilson*.

CONCLUSION

For the reasons stated, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

DATED: October 19, 1999

Respectfully submitted,

FRANK A. WEISER
Counsel of Record
Attorney for Petitioners
Aida Ortiz and Jose Ortiz

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 16 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOSE ORTIZ; AIDA ORTIZ; GENEROSO MORALES; AIDA MORALES,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; SHERMAN BLOCK, Sheriff; LARRY MAYFIELD; TERRY BOWER; D. MOORE; GIL GARCETTI, District Attorney; WALDEN ENVIRONMENT, INC.,

Defendants-Appellees.

No. 97-56540
CV-96-01093-LGB

MEMORANDUM[1]

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

Argued and Submitted June 11, 1999
Pasadena, California

Before: BROWNING, THOMAS and WARDLAW, Circuit Judges.

Plaintiffs appeal the district court's grant of summary judgment against them on their federal claims pursuant to 42 U.S.C. § 1983. We affirm.

I.

The district court did not err in granting summary judgment against Jose and Aida Ortiz on their section 1983 claims against the County of Los Angeles and its police officers because there was no constitutional violation in Jose Ortiz's arrest or prosecution. First, no reasonable jury could find that Officers Moore and David Bower lacked probable cause to arrest Jose Ortiz. They were requested to arrest Ortiz by Officer Tania Bower, who interviewed the victim at the hospital and was privy to a medical examination of the victim showing that the victim's injuries were consistent with the reported sexual assault. *See McKenzie v. Lamb*, 738 F.2d 1004, 1008 (9th Cir. 1984) ("Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested."

(citation omitted).

Second, the warrantless arrest of Jose Ortiz in his home did not offend the Constitution because his wife Aida Ortiz gave specific consent for the officers to enter the home. *See United States v. Shaibu*, 920 F.2d 1423, 1426 (9th Cir. 1990) (consent to enter the home valid if "there was no duress or coercion" and consent is "unequivocal and specific" and "freely and intelligently given").

Third, no constitutional violation occurred when the police seized the Ortiz's vehicle. The vehicle was properly impounded, incident to a lawful arrest, as an instrumentality of the crime. *See United States v. Robinson*, 414 U.S. 218, 225 (1973) (instrumentality of the crime may be seized incident to lawful arrest).

Fourth, the claims against Officer Mayfield founder because appellants failed to overcome the presumption that the prosecutor exercised independent judgment in filing charges against Jose Ortiz. *See Smiddy v. Varney*, 803 F.2d 1469 (9th Cir. 1987) (as amended). Ortiz argues that Mayfield wrongly attributed certain remarks to him during a jailhouse interview, and passed those on to the prosecutor. Even if true, there is nothing in those remarks that leads us to believe Mayfield was motivated by a personal animus against Ortiz, or that Mayfield supplied wholly false information to the prosecutor in an attempt to influence the prosecutor. *See Smiddy*, 803 F.2d at 1471.

Last, appellants argue that Jose Ortiz's rights under the Sixth and Fourteenth Amendment were violated by certain procedures at his preliminary hearing conducted pursuant to California Penal Code sections 866(a) and 872(b). If these sections of the California Penal Code suffer from any constitutional infirmity, and

we express no opinion on that question, such infirmity is not chargeable to Officer Mayfield and District Attorney Garcetti under §1983. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("Liability under section 1983 arises only upon a showing of personal participation by the defendant.").

II.

The district court did not err in granting summary judgment against the Morales on their section 1983 claims against Walden. The Morales have no constitutionally protected property interest in certification by Walden as a foster family home. A property interest protected by the Constitution may arise when "an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law." *Wedges/Ledges of Cal. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (internal quotation marks and citations omitted). "A reasonable expectation of entitlement is determined largely by the language of the statute and the extent to which the entitlement is couched in mandatory terms." *Id.*

Here, the relevant statute states that "[t]he foster family agency [Walden] shall issue a certificate of approval to the certified family home [the Morales home] upon its determination that it has met the standards established by the department .... The certificate shall be valid for a period not to exceed one year. The annual recertification shall require a certified family home to complete at least 12 hours of structured applicable training or continuing education." Cal.Health & Safety Code § 1506(b)(2) (West Supp. 1999). In

effect, certification is a provisional status, renewable on an annual basis. Moreover, the statute allows a foster family agency "to require a family home to meet additional standards or be compatible with its treatment approach." § 1506(b)(1). Finally, the statute provides absolute discretion to a foster family agency in terminating family home certification: "If the agency determines that the home no longer meets the standards, it shall notify the department and the local planning agency." §1506(b)(3). This statute does not give rise to a reasonable expectation of entitlement. *Cf. Wedges/Ledges*, 24 F.3d at 64 (owners of gaming machines had property interest in existing licenses for the machines because the statutory language served as "a substantial limitation on the discretion of the City Treasurer" to revoke the licenses).

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUL 27 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOSE ORTIZ; AIDA ORTIZ; GENEROSO MORALES; AIDA MORALES,

Plaintiffs-Appellants,

v.

COUNTY OF LOS ANGELES; SHERMAN BLOCK, Sheriff; LARRY MAYFIELD; TERRY BOWER; D. MOORE; GIL GARCETTI, District Attorney; WALDEN ENVIRONMENT, INC.,

Defendants-Appellees.

No. 97-56540
CV-96-01093-LGB

ORDER

Before: BROWNING, THOMAS and WARDLAW, Circuit Judges.

The appellant's Petition for rehearing is DENIED.

APPENDIX C

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
CLERK, U.S. DISTRICT COURT
SEP 4 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
SEP 2 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

JOSE ORTIZ; AIDA ORTIZ; GENEROSO MORALES; AIDA MORALES,

Plaintiffs,

v.

COUNTY OF LOS ANGELES et al.,

Defendants.

CV 96-1093 LGB (Mcx)

ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendants' Two Motions for Summary Judgment came on regularly for hearing on August 28, 1997. Having reviewed ll pertinent papers on file and having considered the oral argument of counsel and for the

reasons set forth below, the Court hereby GRANTS SUMMARY JUDGMENT to DEFENDANTS on ALL CLAIMS except the state law claim of negligence against defendant Walden Environment, Inc., which the Court DISMISSES WITHOUT PREJUDICE to refiling in state court.

II. PROCEDURAL HISTORY

Plaintiffs Jose Ortiz[1], Aida Ortiz, Generoso Morales, and Aida Morales (collectively "Plaintiffs") bring this 42 U.S.C. §1983 action against the County of Los Angeles ("the County"); Sheriff Sherman Block ("Block"); John Mayfield ("Mayfield"), erroneously sued as "Larry Mayfield"; David Bower, erroneously sued as "Terry Bower";[2] David Moore ("Moore"); Gil Garcetti"), District Attorney for the County of Los Angeles; Walden Environment, Inc. ("Walden"); and Does 1-100

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[1] Plaintiffs sometimes refer to this person as "Israel" Ortiz.

[2] There is a Los Angeles County Sheriff's Deputy named Tania Bower who was involved in the criminal prosecution out of which this civil case partly arises. She is not, however, a defendant in this case. While the Complaint dos name a "T. Bower," it does not allege any facts that correspond with the description of Tania Bower's participation in the case as set out in her declaration. In addition, Tania Bower has never appeared in the action, and Plaintiffs have neither submitted proof of service on Tania Bower nor sought default judgment against Tania Bower. Moreover, it is clear that *David* Bower *is* a defendant in this case. The Complaint contains allegations that relate to the conduct of David Bower (as made clear by his declaration), Plaintiffs filed proof of service on him (on October 29, 1996), he has answered the Complaint, and he has moved for summary judgment.

inclusive.[3] Plaintiffs filed their Complaint on February 14, 1996, claiming (1) violations of their Fourth and Fourteenth Amendment rights under 42 U.S.C. §1983, against all defendants; and (2) negligence, against Walden.

On August 21, 1996, the County and Sheriff Block answered. On September 13, 1996, Moore answered.

On October 18, 1996, Walden answered and filed a crossclaim for indemnity ("Walden's Crossclaim") against the County and Mayfield.

On October 29, 1996, pursuant to a request from Plaintiffs, the Clerk of the Court entered the default of Garcetti. However, the default was set aside by stipulation filed on November 15, 1996.

On October 31, 1996, Mayfield answered. On November 6, 1996, David Bower answered. On November 21, 1996, Garcetti answered.

On November 6, 1996, the County and Mayfield moved to dismiss Walden's Crossclaim for failure to state a claim upon which relief may be granted. By Order entered January 21, 1997, the Court granted the Motion to Dismiss and dismissed the Crossclaim.

On July 21, 1997, the County Defendants moved for summary judgment, as did Walden by separate motion. Plaintiffs opposed the first motion on August 4, 1997, and the second on August 5, 1997. The County Defendants and Walden replied separately on August 11, 1997. Those two Motions for Summary Judgment are presently before the Court.

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[3] All named defendants except Walden are referred to collectively as the "County Defendants." The various defendants who work for the Sheriff's Department are also referred to as the "Sheriff's Defendants."

III. FACTUAL BACKGROUND

The following facts are undisputed except as otherwise indicated.[4]

Walden is a Foster Family Agency licensed by the State of California. (Blanford Decl. ¶ 3.)[5] In November 1994, Walden entered into a written Foster Family Agency Agreement with the County. (Blanford Decl. ¶¶ 4-5 & Ex. A.) Pursuant to that contract, Walden agreed, among other things, to recruit, certify, train, and provide professional support to certified foster parents. (*Id.* ¶ 6 & Ex. A; Compl. ¶ 10.)

Foster parents certified by a Foster Family Agency are issued a Certificate of Approval by the Foster Family Agency, which authorizes the foster parents' home to operate as a certified family home to be used exclusively by the Foster Family Agency. (Blanford Decl. ¶ 7.) A private contract exists between Walden and each of its certified foster parents, pursuant to which either party is free to terminate Walden certification at any time, with or without cause. (*Id.* ¶ 10.) Walden is a private non-profit organization, and the foster parents are volunteers. (*Id.* ¶ 9.) The parents are

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[4] Facts which Defendants support with evidence and which Plaintiffs either do not address at all or do not dispute with contrary evidence are presumed to be undisputed or established. Similarly, facts which are alleged by Plaintiffs in their Complaint and which Defendants do not address or dispute with evidence are also presumed to be undisputed or established.

[5] Robert Blanford has worked for Walden for approximately twenty years and is currently the Interim Executive Director and the Custodian of Records. (*Id.* ¶ 1.)

reimbursed for expenses incurred in caring for foster children placed in their care, but are not paid for their services and are not paid any kind of placement fee. (*Id.*)

Prior to the incidents at issue in this case, Walden issued a Certificate of Approval to the Moraleses. (Blanford Decl. ¶ 8; Pls.' Opp. Walden's Summ. J. ("Pls.' Walden Opp.") at 1.) The Moraleses and Walden entered into a written agreement, pursuant to which either they or Walden could terminate their certification with or without cause. (Blanford Decl. ¶ 11 & Ex. B.) In addition, the agreement provided that possible grounds for termination include residential clients, repeated acts of poor judgment, engaging in illegal or immoral acts, and use of unapproved treatment or parenting practices which did not meet Walden standards of quality residential care. (*Id.* Ex. B.)

On December 1, 1994, Walden placed a fourteen-year-old child named Diane Naranjo ("Naranjo") in the Moraleses' home. (Compl. ¶ 11.) On February 14, 1995, Los Angeles County Sheriff's Deputy Tania Bower received a call to respond to the Antelope Valley Hospital Emergency Room in Lancaster regarding allegations of sexual crimes made by Naranjo. (Tania Bower Decl. ¶ 3.) At the hospital, Tania Bower was contacted by Martha Catalina Nunez, the birth mother of Naranjo, who told Tania Bower that Naranjo had indicated to her that Naranjo had been sexually assaulted by Jose Ortiz. (*Id.* ¶¶ 4-5.) Tania Bower also personally interviewed Naranjo, who said Jose Ortiz had raped her on February 10, 1995 while they were both in his car, and described in detail the circumstances of the alleged attack. (*Id.* ¶¶ 8-12.) The nurse who examined Naranjo, Paulette Mahren ("Mahren"), prepared a report

consistent with the history Naranjo had related to Tania Bower. (*Id.* ¶¶ 14-15.)[6] Tania Bower obtained from Naranjo and took into custody Naranjo's pants and underwear, which had not been washed. (*Id.* ¶ 16.) While at the hospital, Tania Bower also spoke with Naranjo's social worker from the Department of Children's Services Maria Rodriguez, (*id.* ¶ 6), and Naranjo's school counselor Linda Gardner, (*id.* ¶ 13.)

Tania Bower has received training in the investigation of sex crimes and in taking reports from victims of sex crimes. (*Id.* ¶ 2.) She has been assigned and has taken hundreds of reports from victims of sexual assaults and crimes, of which approximately 40% were from minors. (*Id.*)

Tania Bower then contacted Deputy David Moore ("Moore") , who was working a patrol vehicle in the City of Palmdale, and instructed Moore to go to Jose Ortiz's residence, take him into custody, and impound his automobile. (Tania Bower Decl. ¶ 17.)[7] Moore than went to the residence, where he was met by Deputy David Bower and Sergeant Richard Gurr ("Gurr"). (Moore Decl. ¶ 4.)[8] The officers had neither an arrest

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[6] Mahren's report is attached as Exhibit C to the County Defendants' Motion.

[7] Tania Bower subsequently submitted a report of her investigation. (Tania Bower Decl. ¶ 23; County Defs.' Mot. Ex. B.) She had no further contact with the case. (Tania Bower Decl. ¶ 23.)

[8] The time at which the officers arrived is not entirely clear. Plaintiffs' own evidence is conflicting. Aida Ortiz indicates that it was "11:30 *a.m.*," (Aida Ortiz Decl. ¶ 5 (emphasis added)), while Jose Ortiz states that it was "11:30 *p.m.*," (Jose Ortiz Decl. ¶ 6 (emphasis added)). Other testimony from Plaintiffs, however, does

warrant nor a search warrant. (Pls.' Statement of Genuine Issues ("Pls.' Issues") ¶ 4; County Defs' Response to Pls.' Issues ("County Defs.' Response") at 4.) Aida Ortiz answered the door, and Moore, David Bower, and Gurr then entered the Ortiz residence. (*Id.* ¶ 5.)[9]

Jose Ortiz, who was in the residence, was then arrested. (Moore Decl. ¶ 5.) It is undisputed that Moore carried out the arrest. However, the parties dispute whether David Bower also participated in the actual arrest. Plaintiffs' evidence indicates, rather vaguely, that the arrest was carried out by "the County Sheriff's Department," (Jose Ortiz Decl. ¶ 6), and "the Sheriffs," (Aida Ortiz Decl. ¶ 11). The County Defendants, on the other hand, point to the affidavit testimony of David Bower indicating that he did not participate in the arrest itself. (David Bower Decl. ¶¶ 5, 8.)

It is undisputed that David Bower searched and seized Jose Ortiz's automobile. (Pls.' Issues ¶ 5; County Defs.' Response at 4.) It is also undisputed that the vehicle was not in plain view but was in a garage, although the parties dispute whether the door to the garage was locked. Pls.' Issues ¶ 6; County Defs.' Response at 5.) The parties dispute whether Moore participated in the search and seizure of the vehicle. (Pls.' Issues ¶¶ 5, 7; County Defs.' Response at 4, 5.)

Jose Ortiz was taken by Moore to the Antelope

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suggest that the officers arrived at night. (Aida Ortiz Decl. ¶ 8; Jose Ortiz ¶¶ 8-10.)

[9] The parties do not dispute that the entry was with Aida Ortiz's consent, but they do dispute the scope of that consent. (*See infra* p. 24.)

Valley Sheriff's station and booked. (Moore Decl. ¶ 9.) Subsequently, Moore submitted a Supplemental Report. (Moore Decl. ¶ 13; County Def.' Mot. Ex. D.) Neither Moore nor David Bower had any further contact with the criminal action against Jose Ortiz. (Moore Decl. ¶ 13; David Bower Decl. ¶ 8.)

Detective Mayfield was assigned to the Juvenile Investigations Bureau, and it was in that capacity that he first became involved in the case against Jose Ortiz. (Mayfield Decl. ¶ 2, 3.) He was put in charge of investigating the allegations by Naranjo against Jose Ortiz. (Pls.' Issues ¶ 9; County Defs.' Response at 7.) As part of his investigation, Mayfield reviewed the reports made by Tania Bower and Moore, and interviewed Naranjo. (*Id.* ¶¶ 5-6, 7, 9.) During the interview Naranjo gave Mayfield an account of the incident which was substantially similar to that which Tania Bower had heard from Naranjo. (*Id.* ¶ 9.) Naranjo also informed Mayfield that she had given Tania Bower the incorrect underwear, and gave Mayfield what she indicated was the underwear she was wearing during the alleged rape. (*Id.* ¶ 10.) Mayfield later spoke briefly with Jose Ortiz, after advising Ortiz of his constitutional rights. (*Id.* ¶ 11.) In addition, Mayfield spoke with Gardner, Naranjo's school counselor, who advised Mayfield that Naranjo had described the alleged attack to her. (*Id.* ¶ 14.)[10]

On February 16, 1995, Mayfield presented the case to Deputy District Attorney Kelly Cromer of the District

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[10] The parties dispute whether Mayfield attempted to speak with Aida Morales. He has testified that he did and she refused to speak with him. (*Id.* ¶ 12.) She has testified that she has never met or spoken with Mayfield. (Aida Morales Decl. ¶ 19.)

Attorney's Office in the Antelope Valley, and gave her the reports and other documents he had reviewed or gathered as well as the information his investigation had yielded. (Mayfield Decl. ¶ 15; Cromer Decl. ¶¶ 8-9.) He also re-interviewed Naranjo in Cromer's presence, and Naranjo gave an account substantially similar to the others she had given. (Mayfield Decl. ¶ 18.) The three counts were filed on February 16, 1995 by the District Attorney's Office. (*Id.*) At no point prior to the filing of the criminal action did any individual or entity provide material to Mayfield indicating that Naranjo had any history of making unsubstantiated allegations. (*Id.* ¶ 36.)

The day after the criminal case was filed, Mayfield, responding to Naranjo's statement that Jose Ortiz had told her to wipe herself following the assault, inspected Jose Ortiz's impounded vehicle for tissues, but did not find any. (Mayfield Decl. ¶ 20.) On February 22, 1995, Mayfield had a technician from the Sheriff's Department Laboratory search the vehicle for semen samples, but the technician did not find any. (*Id.* ¶ 21.) On May 17, 1995, Mayfield received the results of tests done on the underwear provided by Naranjo, which indicated that there was no semen on the underwear. (*Id.* ¶ 22.) Mayfield reported these findings to the District Attorney's Office. (*Id.* ¶ 21-22.)

On May 22 and May 23, 1995, a preliminary hearing was held in Antelope Valley Municipal Court in the criminal case against Jose Ortiz. (Pls.' Issues ¶ 11; County Defs.' Response at 8.) The prosecuting agency was the Los Angeles County District Attorney's Office. (Pls.' Issues ¶ 11; County Defs.' Response at 8.) At the hearing, Jose Ortiz was required to make an offer of proof as to what his witnesses would testify to, but his

offer of proof was rejected by the District Attorney and the judge. (Pls.' Issues ¶12; County Defs.' Response at 9; Pls.' County Opp. at 20-21.) In early October 1995, at the request of the District Attorney's Office, Mayfield again interviewed Naranjo, and submitted the information he obtained to the District Attorney's Office. (*Id.* ¶ 23.) At some subsequent point in October 1995, the criminal case against Jose Ortiz was dismissed by the District Attorney's Office. (Compl. ¶¶ 29, 32; (Moore Decl. ¶ 24.)

After Walden became aware of the alleged attack, it removed all foster children from the Moraleses on an emergency basis, except for Naranjo, whom the County had already removed. (Blanford Decl. ¶ 13.) Walden then conducted its own investigation of the matter, in the course of which it interviewed the Moraleses. (*Id.* ¶ 14.) The investigation was inconclusive as Walden could not determine with certainty whether or not the alleged sexual assault had actually occurred. (*Id.* ¶ 15.) Nevertheless, Walden terminated the certification of the Morales home. (*Id.* ¶ 16.) Walden maintains, and Plaintiffs do not dispute, that the decertification by Walden did not preclude the Moraleses from applying to be certified by another Foster Family Agency, of which there are many. (*Id.* ¶¶ 18-19.)

Plaintiffs allege, and Defendants do not dispute, that, as a result of his prosecution, Jose Ortiz temporarily lost his job and has not received full backpay. (Compl. ¶ 33.)

IV. DISCUSSION

Plaintiffs' Complaint does not identify separately the claims against each defendant, but instead brings a

general claim under 42 U.S.C. § 1983 against all defendants and a claim for negligence against Walden only. Through their two Motions for Summary Judgment on all claims as against all Defendants.

A. General Standards for Summary Judgment

Summary judgment shall be granted if the evidence supporting the motion for summary judgment shows that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party moving for summary judgment may carry its initial burden by pointing out to the district court that there is an absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

"One the initial responsibility has been met, the burden shifts to the nonmoving party to oppose the motion by showing specific facts, pursuant to Fed. R. Civ. P. 56(e), which establish a genuine issue for trial." *Nilsson, Robbin, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1544 (9th Cir. 1988). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn" in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. To avoid summary judgment, an adverse party "may not rest upon the mere allegations or denials of the party's pleading." Fed. R.

Civ. P. 56(e). In addition, the district court is "under no obligation to mine the full record for issues of triable fact." *Schneider v. TRW, Inc.*, 938 F.2d 986, 991 n. 2 (9th Cir. 1991) (citing *Nilsson*, 854 F.2d at 1545).

A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "[T]o withstand a motion for summary judgment, the non-moving party must show that there are 'genuine factual issues that properly can be resolved in favor of either party.'" *California Architectural Bldg. Prods. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson*, 477 U.S. at 250), *cert. denied*, 484 U.S. 1006 (1988).

B. Claims Under 42 U.S.C. § 1983

All Plaintiffs bring a general section 1983 claim against all defendants. The claim appears to encompass a number of different alleged violations of different Plaintiffs' rights under the Fourth, Sixth and Fourteenth Amendments by different defendants. The confused presentation of these alleged violations makes it difficult to discern what specific causes of action Plaintiffs allege against which defendants for which conduct. Nevertheless, as set out below, several distinct claims do emerge.

1. Legal Standards

Section 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other

> person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. "To prove a violation of section 1983, the [plaintiffs] must demonstrate that [the defendant] (1) deprived them of a right secured by the Constitution, and (2) acted under color of state law." *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir. 1989) (citing *West v. Atkins*, 487 U.S. 42 (1988)), *cert. denied*, 493 U.S. 1056 (1990).

2. Application

Preliminarily, the Court must address a claim made by Plaintiffs which is simply too vague and unsupported to withstand the Motions for Summary Judgment. Plaintiffs appear to be trying to assert an equal protection claim under the Fourteenth Amendment. (Compl. ¶ 40.) It is not at all apparent, however, which defendants Plaintiffs are addressing and what conduct underlies the claim. In addition, in opposing the summary judgment motions, Plaintiffs fail to point to any evidence in support of their vague and conclusory statement in the Complaint that the defendants' actions "were not directed at or carried out in a similar fashion as to other similarly situated residents in other areas of the County." (*Id.*) Therefore, to the extent that Plaintiffs are bringing their general section 1983 claim for an alleged violation of the Equal Protection Clause of the Fourteenth Amendment, the Court GRANTS SUMMARY JUDGMENT on that claim to ALL DEFENDANTS.

The following claims are set out with at least enough clarity to give an indication of their basis and the defendants against whom they are alleged:

(1) Jose Ortiz's claim that he was arrested without probable cause in violation of the Fourth Amendment, (Compl. ¶23);

(2) Jose and Aida Ortiz's claim that their automobile was unlawfully searched and seized in violation of the Fourth Amendment, (*id.* ¶¶ 22, 39)[11]

(3) Jose Ortiz's claim that he was prosecuted in violation of his Fourth Amendment right to due process and his Sixth Amendment right to confront witnesses against him, (*id.* ¶¶ 25-26, 39);

(4) The Moraleses' claim that they were denied due process in the revocation of their alleged "license"[12] to operate a foster care home, (*id.* ¶¶ 33, 39); and

(5) Jose and Aida Ortiz's claim, in connection with claims (1), (2), and (3), for *Monell*[13] violations, (*id.* ¶¶ 37, 39.)

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[11] While the Complaint alleges that the officers also searched the Ortiz home, Plaintiffs do not expand on that allegation. Moreover, they provide on evidence that the officers conducted a search of the home beyond entering the residence, arresting Jose Ortiz, and entering the garage to search and seize the automobile. Plaintiffs seem to focus only on the search of the vehicle. (*See* Pls.' Opp. Defs.' Mot. Summ. J. ("Pls.' County Opp.") at 12 ll. 19-20; *id.* at 25-27; *id.* at 13 ll. 15-17.)

[12] The issue of whether the Moraleses had a license issued by the County is addressed below at p. 28.

[13] *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978).

a. Section 1983 Claims Against Walden

It is clear that claims (1) - (4) do not apply to Walden, notwithstanding Plaintiffs' indication that the entire general section 1983 claim is brought against all Defendants. Plaintiffs have not even alleged, let alone submitted evidence, that Walden was involved in the arrest of Jose Ortiz, the seizure of the automobile, the prosecution of Ortiz, or in the establishment or carrying out of any government policy alleged revealed by that arrest, seizure or prosecution. Therefore, to the extent that Plaintiffs are bringing those four claims against Walden, the Court GRANTS SUMMARY JUDGMENT to WALDEN on those claims. That leaves, as far as section 1983 claim against Walden, only one claim, the Moraleses' claim for the loss of their alleged license. (That claim is discussed below at p. 28.)

b. Section 1983 Claim Against Mayfield

The County Defendants also argue that Plaintiffs provide no basis for holding defendant Mayfield liable on any of the five claims listed above. They are clearly correct as to the claims for Jose Ortiz's arrest, the search and seizure of the automobile, any *Monell* claims related thereto, and the revocation of the Moraleses' alleged license, as there is no allegation or evidence that Mayfield was involved in the conduct on which those claims are based.

Defendants are also correct with regard to the claim against Mayfield for the prosecution of Jose Ortiz and any related *Monell* claims. Generally, an investigating police officer is not liable for the decision made by a prosecutor to bring criminal charges against a suspect.

See Smiddy v. Varney, 665 F.2d 261, 266 (9th Cir. 1981) ("Filing of a criminal complaint immunizes investigating officers such as the appellants from damages suffered thereafter because it is presumed that the prosecutor filing the complaint exercised independent judgment in determining that probable cause for an accused's arrest at that time."), *cert. denied*, 459 U.S. 829 (1982). That presumption may be rebutted, however, where the officer pressured or caused the prosecutor to act contrary to the prosecutor's independent judgment, or knowingly presented false information to the prosecutor. *See id.* at 266-67. "[W]here police officers do not act maliciously or with reckless disregard for the rights of an arrested person, they are not liable for damages suffered by the arrested person after a district attorney files charges unless the presumption of independent judgment by the district attorney is rebutted." *Id.* at 267.

Here, Mayfield presented information to the District Attorney's Office, but, as shown by the County Defendants' evidence, he lacked the authority to make and did not make the decision to prosecute Jose Ortiz. (Mayfield Decl. ¶¶ 17, 33.) It is undisputed that the Sheriff's Department does not "prosecute" criminal cases. The decision to prosecutor was made by the District Attorney's Office, specifically Deputy District Attorney Cromer, and was made without any attempt by Mayfield to insist on or coerce Cromer into filing the criminal charges. (*Id.* ¶¶17-18; Cromer Decl. ¶¶ 17-19.) Plaintiffs point to no evidence to the contrary.[14]

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[14] The relevance of Plaintiffs' citation to a string of cases which purportedly subject a state and its employees to liability for the failure to investigate child abuse cases is not apparent. (Pls.' County Opp. at 17.)

In addition, Plaintiffs have not rebutted the County Defendants' evidence that Mayfield did not present any false or misleading information to the District Attorney's Office, but instead presented what information he had at the time. (Mayfield Decl. ¶17.) They contend that Mayfield failed to conduct an adequate investigation, but that is merely an allegation that the District Attorney's Office lacked a sufficient factual basis on which to bring criminal charges.[15] Moreover, some of the alleged deficiencies in Mayfield's investigation relate to information, such as laboratory test results on Naranjo's underwear, which was not available at the time the decision to prosecute was made. Mayfield has testified that at time he presented his information to the District Attorney's Office, no one had come forward with written investigative information concerning the victim's credibility or alleged history of making false accusations. (Mayfield Decl. ¶ 36.) He has further testified that he promptly conveyed all scientific evidence he received to the District Attorney's Office. (*Id.* ¶ 35.)[16] Again, Plain-

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[15] Plaintiffs do note that Mayfield had tests conducted on the underwear Naranjo gave him, but apparently did not investigate the underwear Naranjo originally gave Tania Bower at the hospital. (Pls.' County Opp. at 18.) It is not clear, however, how that alleged investigative lapse can render Mayfield liable for the prosecutor's determination that a criminal case was appropriate.

[16] As well, Plaintiffs themselves allege that Mayfield interviewed Naranjo again on October 4, 1995 and learned that she had hallucinations in which she saw her dead grandmother as a ghost. (Plaintiffs appear to assume that that indicates a lack of credibility on the part of Naranjo.) They then note that the charges against Jose Ortiz were dropped that same month, which suggests that Mayfield's promptly passed on relevant information to the District

tiffs point to no contrary evidence.[17]

Plaintiffs provide no authority for holding Mayfield liable for a prosecution decision made on the basis of allegedly insufficient information.[18] Finally, Mayfield cannot personally be held liable on a *Monell* claim.

Therefore, the Court GRANTS SUMMARY JUDGMENT to MAYFIELD on all claims against him.

c. Section 1983 Claims Against Remaining Defendants

i. Fourth Amendment Claims

The Fourth Amendment to the United States Constitution protects persons against "unreasonable searches and seizures." U.S. Const. amend IV. The "reasonableness" and hence constitutionally of a warrant-

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Attorney's Office.

[17] Indeed, Plaintiffs assert that Mayfield is liable on the basis of information that was in the files of the District Attorney's Office. (Pls.' County Opp. at 19-20.) They do not explain, however, how Mayfield can be held liable for the continuing prosecution of Jose Ortiz based on allegedly exculpatory information that was in the possession of the prosecuting agency.

[18] Even if they had, the evidence on which they rely at most might establish that Mayfield was negligent, not that he acted with "deliberate indifference." Mere negligence, however, cannot support a claim for violation of civil rights. *See Daniels v. Williams*, 474 U.S. 327, 328 (1986) (holding that negligent act causing unintended loss of or injury to life, liberty or property does not amount to deprivation that implicates Due Process Clause); *see also Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (following *Daniels*).

less search or seizure is determined by the existence of probable cause. *See Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990). The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, prohibits arrests without probable cause. *See McKenzie v. Lamb*, 738 F.2d 1005, 1007 (9th Cir. 1984) (citing *Beck v. Ohio*, 379 U.S. 89, 90-91 (1964). Arrests without probable cause thus give rise to a cause of action for damages. *See McKenzie*, 738 F.2d at 1007.

"Probable cause is determined by applying a 'totality-of-the-circumstances' analysis." *Merriman v. Walton*, 856 F.2d 1333, 1335 (9th Cir. 1988) (citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983)), *cert. denied*, 491 U.S. 905 (1989). "'Probable cause exists where the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested.'" *McKenzie*, 738 F.2d at 1008 (quoting *Dunaway v. New York*, 442 U.S. 200, 208 n. 9 (1979) (quotations and citations omitted in original)). "[I]n a § 1983 action the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury, and summary judgment is appropriate only if no reasonable jury could find that the officers did or did not have probable cause." *McKenzie*, 738 F.2d at 1008. (citations omitted.)

Conclusive evidence of guilt is not necessary to establish probable cause. *See id.* (citing *Henry v. United States*, 361 U.S. 98, 101 (1959)). "Probability requires 'a probability or substantial chance of criminal activity.'" *Merriman*, 856 F.2d at 1335 (quoting *Illinois v. Gates*, 462 U.S. at 243 n. 13). There must be some objective

evidence which would allow a reasonable officer to deduce that a particular individual has committed or is in the process of committing a criminal offense. *See McKenzie*, 738 F.2d at 1008 (citing *Beck*, 379 U.S. at 93-95; *Wong Sun v. United States*, 371 U.S. 471, 480-83 (1963); and *Henry*, 361 U.S. at 102-04); *see also Barry*, 902 F.2d at 773 (citing *Michigan v. De Fillippo*, 443 U.S. 31, 37 (1979)). In a § 1983 action, "the factual matters underlying the judgment of reasonableness generally mean that probable cause is a question for the jury." *McKenzie*, 738 F.2d at 1008.

(A) Jose Ortiz's claim for arrest without probable cause in violation of Fourth Amendment

Plaintiffs appear to bring this claim against the County, Moore and David Bower.[19] To the extent that Plaintiffs may be bringing this claim against Mayfield and Walden, and it is not clear whether they are, the claim is wholly unsubstantiated. On that basis, the Court, therefore, GRANTS SUMMARY JUDGMENT on this claim to defendants MAYFIELD and WALDEN. The Court examines the claim in detail only as it relates to Moore and David Bower.

The County Defendants maintain that the decision to arrest Jose Ortiz was made solely by Tania Bower, who is not a defendant in this case. (Defs.' Mot. Summ. J. at 11.) They contend that Moore and David Bower simply carried out that decision, based on information

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[19] The extent to which Plaintiffs use this claim as the basis for a *Monell* claim against the County is discussed below at p. 35.

provided to them by their fellow officer through official police channels. (*Id.*) Plaintiffs do not dispute that the question of probable cause to arrest Jose Ortiz turns on the information that was available to Tania Bower. (*See* Pls.' County Opp. at 14.) They do not argue that the arresting officer or officers must themselves personally have had probable cause. *See United States v. Green*, 962 F.2d 938, 942 (9th Cir. 1992) ("Probable cause may be based on the collective knowledge of the officers involved in the investigation and all of the reasonable inferences that may be drawn from their knowledge.") Instead, they first challenge that Tania Bower had probable cause, and then contend that the officers were not given permission to enter the Ortiz residence to arrest Jose Ortiz.

(1) Probable Cause

Thus, the relevant inquiry here is whether, objectively, there was sufficient information to support probable cause to arrest. At issue is the information which Tania Bower undisputedly possessed prior to arresting Jose Ortiz. *See Merriman*, 856 F.2d at 1335 ("'The relevant question ... is whether ar reasonable officer could have believed [the plaintiff's] warrantless [arrest] to be lawful, in light of clearly established law and the information the ... officers possessed.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 636 (1987)).

The record reveals that Tania Bower had information provided by the purported crime victim. Such information can itself be sufficient to establish probable cause. *See Pendleton v. Nelson*, 404 F.2d 1074, 1075-76 (9th Cir. 1968) ("Under California law, a citizen who purports to be the victim of a crime is a reliable infor-

mant even though his reliability has not theretofore been proven or tested."). Further, Tania Bower was experienced in investigating and taking reports from victims of sex crimes, including minors,[20] and "[t]he experience and expertise of the officers involved may be considered in determining probable cause." *Green*, 962 F.2d at 942. Thus, Tania Bower, on the basis of her own experience and Naranjo's statements, had probable cause to request the arrest of Jose Ortiz.

In addition, that information was corroborated by the results of the nurse's examination. Plaintiffs challenge the report on three grounds. First, they argue against the existence of probable cause in part because the medical examination of Naranjo was conducted more than seventy-two hours after the alleged rape. Plaintiffs fail, however, to give any explanation of how the fact argues against probable cause.

Second, Plaintiffs maintain that the medical examination was not conducted by a medical professional specially trained in detecting child abuse and neglect. The County Defendants do not respond directly to these arguments, preferring to assert that a purported victim's

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[20] Plaintiffs' contention that Tania Bower was not experienced in detecting child abuse, (Pls.' County Opp. at 14), even if true, is immaterial and does not rebut the evidence that Tania Bower was experienced in taking reports of sexual assault and investigating such allegations.

Plaintiffs argue for the presence of a genuine issue regarding probable cause partly on the ground that Tania Bower did not inquire if Naranjo was sexually active between the time of the alleged rape and when Tania Bower interviewed her. (*Id.* at 15.) Plaintiffs fail, however, to show how not making such an inquiry negates the probable cause established by an alleged crime victim's statements as interpreted by an experienced officer.

story does not need corroboration in order to furnish probable cause to arrest the accused perpetrator. (County Defs.' Reply at 12-13.) They correctly note, however, that Plaintiffs cite to no contradictory authority. Moreover, Plaintiffs, again, fail to provide any explanation as to how the absence of special training in recognizing child abuse and neglect would render incredible a report on a sexual assault victim prepared by a registered nurse.

Finally, Plaintiffs object to the medical report made by the nurse as hearsay. While Tania Bower states that Mahren was a registered nurse and that Mahren prepared the report, (Tania Bower Decl. ¶¶ 14-15), there is no declaration before the Court from Mahren herself. Nevertheless, the report is not, in fact, hearsay because it is not offered for its truth, but is offered to show that the information before the officer did establish probable cause. Moreover, even if the medical report were stricken as hearsay, Naranjo's statements to Tania Bower, in light of Bower's experience, would still provide sufficient probable cause.

In short, Deputy Tania Bower had probable cause to request the arrest of Jose Ortiz. Thus, defendants Moore and David Bower had probable cause to arrest Jose Ortiz.

(2) Consent to Enter

Plaintiffs also argue that even if there was probable cause, the arrest was in violation of the Fourth Amendment because the officers entered the Ortiz residence without consent. (Pls.' County Opp. at 12-13.) Plaintiffs concede that Aida Ortiz consented to the officers' entry. (*Id.* at 13; Aida Ortiz Dep. at 27 ll. 20-22; *id.* at 28-29.)

They assert, however, that she only consented to their entry of the purpose of speaking with Jose Ortiz, and not for the purpose of arresting him. However, while Plaintiffs cite to authority for the proposition that the existence of probable cause does not justify entering a suspect's home without consent or a warrant, they cite no authority for the proposition that police with probable cause may not arrest a suspect they find in a home which they have entered with consent. (*Id.* at 11-12.) Moreover, Moore testified in his deposition that while he could not recall the exact words he used when Aida Ortiz answered the door, he did state that "we were there to arrest Mr. Ortiz or words to that effect." (Moore Dep. at 37 ll. 17-19.)

In short, the arrest of Jose Ortiz did not violate his Fourth Amendment rights. Therefore, the Court GRANTS SUMMARY JUDGMENT to ALL DEFENDANTS on Jose Ortiz's Fourth Amendment claim based on his arrest.

(B) Jose and Aida Ortiz's claim for unlawful search and seizure of their automobile in violation of Fourth Amendment

Again, Plaintiffs appear to bring this claim only against Moore and David Bower. To the extent that Plaintiffs may be bringing this claim against Mayfield and Walden, the claim is wholly unsubstantiated. On that basis, the Court, therefore, GRANTS SUMMARY JUDGMENT on this claim to defendants Mayfield and Walden. The Court examines the claim in detail only as it relates to Moore and David Bower.

The County Defendants argue that the search and

seizure of the Ortiz's automobile was lawful because it was incident to the lawful arrest of Jose Ortiz and the automobile was suspected as having been used in the perpetration of the alleged rape. Defendants are correct that, under such circumstances, a seizure of property is proper. "It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment." *United States v. Robinson*, 414 U.S. 218, 224 (1973). In addition, police officers may, incident to a lawful arrest, search and seize items suspected of having been used in the commission of the crime for which the suspect is being arrested. *See id.* at 225 ("'The right without a search warrant contemporaneously to search person lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or *as the means by which it was committed* is not to be doubted.'" (quoting *Agnello v. United States*, 269 U.S. 20, 30 (1925) (emphasis added)).

As noted above, here the arrest was lawful because there was probable cause to arrest and consent to enter the residence. Therefore, the search and seizure of the vehicle did not violate the Ortiz's Fourth Amendment rights, and the Court GRANTS SUMMARY JUDGMENT to MOORE and DAVID BOWER on the Ortiz' Fourth Amendment Claim based on the search and seizure of their automobile.

In addition, none of Plaintiffs' claims other than the above two Fourth Amendments claims addresses Moore and Bower, and it is undisputed that David Bower's contact with the case ended with the impounding of the automobile and Moore's contact entered with the booking of Jose Ortiz and the filing of Moore's report.

Therefore, the Court GRANTS SUMMARY JUDGMENT to defendants DAVID BOWER and MOORE to the extent that any of Plaintiffs' other claims are brought against these two defendants.

ii. Jose Ortiz's claim for prosecution in violation of right to due process

The basis for the alleged due process violation appears to be that the state court permitted Mayfield to give hearsay testimony at the preliminary hearing in lieu of Naranjo herself testifying, pursuant to California Penal Code section 872(b), and rejected Jose Ortiz's offer of proof, pursuant to Penal Code section 866(a). (Pls." County Opp. at 20-21.) Section 872(b) permits a finding of probable cause at a preliminary hearing to be based on "the sworn testimony of a law enforcement officer relating the statements of declarants made out of court offered for the truth of the matter asserted." Cal. Penal Code § 872(b) (West Supp. 1997). Section 866(a) gives magistrate judges discretion to limit the defendant's right to call witnesses on the defendant's behalf at a preliminary hearing. *See* Cal. Penal Code §866(a) (West Supp. 1997)

Plaintiffs maintain that sections 866(a) and 872(b) are unconstitutional and that the application of those provisions to Jose Ortiz's preliminary hearing violated his Sixth Amendment right to confront witnesses against him and his Fourteenth Amendment right to due process. (Compl. ¶ 39.) In essence, Plaintiffs allege that Jose Ortiz was injured through the proper application of unconstitutional state laws.

Plaintiffs' argument is wholly without merit. In *Gerstein v. Pugh*, the United States Supreme Court held

that pretrial probable cause hearings do not require the full range of adversarial safeguards. *See* 420 U.S. 103, 199-25 (1975). The Court expressly indicated its approval of reliance on hearsay testimony at such hearings to establish probable cause. *See id.* at 120. The California Supreme Court, following *Gerstein*, has explicitly upheld sections 866(a) and 872(b) as not violating either the Sixth Amendment confrontation clause on the Fourteenth Amendment due process clause. *See Whitman v. Superior Court*, 54 Cal.3d 1063, 1077-82 (1991). *Whitman* has great persuasive weight.

In short, Plaintiffs' section 1983 claim based on the alleged unconstitutionality of the preliminary hearing procedures lack merit, as does any *Monell* claim based on the same. Therefore, the Court should GRANT SUMMARY JUDGMENT to ALL DEFENDANTS on Plaintiffs' claims based on the prosecution of Jose Ortiz.

iii. Moraleses' claim for denial of due process in revocation of alleged license to operate a foster care home

Plaintiffs allege that the County failed to provide the Moraleses a hearing prior to the revocation of their alleged license to operate a foster home. (Compl. ¶¶ 33, 39.) The basis for this claim appears to be that Walden, which originally certified the Moraleses to operate a foster home, decertified them following the arrest of Jose Ortiz, allegedly without a hearing. (Pls.' Walden Opp. at 5.) Plaintiffs implicate the County by alleging that it regulates the work Walden performs on the County's behalf. (*Id.* at 7.)

The Fourteenth Amendment states that "[n]o State shall ... deprive any person of life, liberty, or property,

without due process of law." U.S. Const. amend. XIV. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). A section 1983 claim based upon procedural due process thus has three elements: (1) a liberty or property interest protected by the Constitution; (2) a deprivation of the interest by the government; and (3) lack of process. *See Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993).

(A) Protected Interest

"A threshold requirement to a substantive or procedural due process claim is the plaintiff's showing of a liberty or property interest protected by the Constitution." *Wedges/Ledges v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994) (citing *Roth*, 408 U.S. at 569). "A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from 'existing rules or understandings that stem from an independent source such as state law.'" *Wedges/Ledges*, 24 F.3d at 62 (quoting *Roth*, 408 U.S. at 577). "The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except for 'cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982).

Walden notes that the Moraleses were, in essence, volunteers who should not have been making any profit from providing foster care. Accordingly, Walden characterizes whatever "interest" is bestowed on foster parents by a Walden certification as being a *property* interest in the right to volunteer to have foster children

placed in their home exclusively by Walden. Walden contends that that interest is not protected by the Constitution, and so that decertification did not deprive the Moraleses of a constitutional property interest. (Walden's Mot. at 12.) Plaintiffs have not disputed Walden's assertion that the Moraleses are free to seek certification from another Foster Family Agency. Instead, Plaintiffs respond by referring to allegedly protected *liberty* interests in their reputation and the "love and affection of the their foster care girls." (Pls. Walden Opp. at 14-15.)

(B) State Action

Assuming, *arguendo*, that Plaintiffs did establish a protected interest, the focus shifts to the second requirement, state action.

The parties' debate about the state action requirement is complicated by the way in which Plaintiffs mingle two separate claims against two separate defendants. First, Plaintiffs allege that Walden violated the Moraleses' right to due process in decertifying them without a hearing. (Pls.' Walden Opp. at 5; Pls.' Statement of Genuine Issues Opp. Walden's Mot. Summ. J. ("Pls.' Walden Issues") ¶ 4.) Second, Plaintiffs allege that the County violated the Moraleses' right to due process in revoking an alleged "license" they held to operate a foster home. (Compl. ¶ 39.) It is not clear whether Plaintiffs view these as separate claims, since at times they seem to view the County and Walden as interchangeable, and decertification and revocation of a license as interchangeable.

(1) Decertification by Walden

Walden argues for summary judgment on the grounds that Plaintiffs have failed to show that Walden, in decertifying the Moraleses, was acting "under color of state law." The determination of whether a party was acting under color of state law involves a two-pronged approach: (1) "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible;" and (2) "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Referring to the second prong, the Supreme Court noted that "[w]ithout a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." *Id.*

Walden contends that it was merely exercising its discretion pursuant to a private written contract between it and the Moraleses, and was not exercising a right or privilege created by the State of California. Although Plaintiffs' response is rather muddled, they appear to claim that because Walden is involved in foster care pursuant to a contract with the County, and foster care is regulated by the State, Walden was necessarily acting under color of state law in decertifying the Moraleses. (Pls. Walden Opp. at 4-5.) Their response seems to hinge on the assertions that they were foster care home licensed under state law, and that Walden, because it is licensed by the State of California, was obliged to abide by California laws and regulations that govern foster care in certifying homes. Those provisions include

sections of the Health and Safety Code which require the State Department of Social Services, in revoking a license to operate a community care facility, to abide by the sections of the California Government Code which provide for administrative hearings and adjudication. *See* Cal. Health & Safety Code §§ 1550, 1551 (West Supp. 1997) (referring to Cal. Gov't Code §§ 11500, *et seq*.

It is clear that what the statutes call "foster family homes," which are licensed by the state, are entitled to certain statutory procedural safeguards as part of a revocation of their license. *See* Cal. Health & Safety Code §1502(5) (West Supp. 1997). Walden, however, contends that the Moraleses were not a licensed "foster family home" as set out in section 1502(5). Instead, Walden maintains, the Moraleses were a "certified family home." *See id* 1506(d) (West Supp. 1997).[21] Such homes are exempted from the licensing requirement that would otherwise apply to them under section 1508. *See id*. §1506(a)(2). As operators of such a home, the Moraleses were required to meet the County's standards as well as standards imposed by the certifying Foster Family Agency. *See id*. § 1506(b)(1) (West Supp. 1997).[22]

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[21] By statute, a family home can be only one or the other, not both. *See id*. §1506(a)(2) (West Supp. 1997)

[22] Thus, Plaintiffs' contention that Walden was required by statute to decertify only for cause (Pls.' Walden Opp. at 8) is without merit. Walden's evidence indicates that it decertified the Moraleses not for failing to meet the state licensing standards, but for not meeting Walden's own additional standards. Plaintiffs have failed to submit evidence to the contrary.

Walden argues that, as a "certified family home," the Moraleses were not entitled to the statutory due process protections afforded "foster family homes," and that Walden, in its relationship with the Moraleses, was not a "state actor." Because Walden raised that particular argument in its Reply, Plaintiffs have not specifically responded to it. Nevertheless, despite citing statutory provisions that apply to licensed foster family homes in their Opposition, Plaintiffs submitted no evidence that the Moraleses were such an entity and had such a license. Indeed, there is ample evidence from Walden to the contrary. Plaintiffs' substitution of "license" for "certification" is thus to no avail. They have provided no basis for concluding that certified family homes are entitled to the same statutory protections as foster family homes licensed by the state.

In short, the Court GRANTS SUMMARY JUDGMENT to WALDEN on Plaintiffs' due process claim based on the decertification.

(2) Decertification by County

The County Defendants move for summary judgment on this claim on the ground that none of them was involved in the certification or decertification of the Moraleses. However, Plaintiffs, in their Opposition to the County Defendants' Motion, simply decline to address the issue of the County Defendants' liability on this claim. Plaintiffs have thus failed to oppose this part of the County Defendants' Motion. *See* Fed. R. Civ. P. 56(e) (to avoid summary judgment, an adverse party "may not rest upon the mere allegations or denials of the adverse party's pleading."); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("[T]he plain language of Rule

56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.").

Even if Plaintiffs had stated that they oppose that part of the County Defendants' Motion, they have failed to submit any evidence in opposition. They have not established that the County would in any way be liable based on its own conduct, separate from that of Walden. Plaintiffs point to no evidence that they had any foster care license or certification issued by the County to be revoked. They also point to no evidence that the County had any hand in Walden's decision to decertify the Moraleses. Plaintiffs cite legal common law and statutory authority for the general proposition that the licensing of foster care homes is an area traditionally regulated by the states. (Pls.' Walden Opp. at 5-7.) However, that authority does not support the contention that the County is somehow liable for the decertification decision of a private agency with which the County has contracted, where the decertification was made pursuant to a private agreement between the claimant and the agency.

The Court concludes that Plaintiffs have failed to show that the Moraleses had a protected interest or that Walden was a state actor. Therefore, the Court need not address whether the Moraleses received due process in the decertification.

In sum, the Court GRANTS SUMMARY JUDGMENT on the Morales due process claim to ALL DEFENDANTS.

iv. *Monell* Claims

(A) Legal Standards

A municipality or municipal official may be held liable under § 1983 if the plaintiff demonstrates that the plaintiff's constitutional rights were violated as a result of an official city policy or custom. *See Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978); *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 889 (9th Cir. 1990). Thus, to establish municipal liability under section 1983, the plaintiff must show that (1) he or she was deprived of a constitutional right; (2) the municipality has a policy; (3) the policy amounts to deliberate indifference to the plaintiff's constitutional rights; and (4) the policy is the moving force behind the constitutional violation. *See Lewis v. Sacramento County*, 98 F.3d 434, 446 (9th Cir. 1996) (citing *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992)), *cert. granted*, 65 U.S.L.W. 3793, 65 U.S.L.W. 3798 (U.S. June 2, 1997) (No. 96-1337).

(B) Application

The threshold requirement for *Monell* liability is a constitutional violation. As the foregoing discussion indicates, Plaintiffs have failed to establish that they suffered any constitutional violations in connection with their section 1983 claims against any defendant. Therefore, there can be no *Monell* liability based on those claims. Accordingly, the Court GRANTS SUMMARY JUDGMENT to the ALL DEFENDANTS on all of Plaintiffs' *Monell* claims.

C. NEGLIGENCE CLAIM

Following the Court's rulings above, there are no more pending claims over which the Court has original jurisdiction. The only remaining claim is the state law claim for negligence brought by all Plaintiffs against Walden only.

Where all of the claims over which the district court had original jurisdiction have been dismissed, the court may decline to retain jurisdiction over the remaining state law claims. *See* 28 U.S.C. § 1367(c)(3); *Schneider v. TRW, Inc.*, 938 F.2d 986, 993-95 (9th Cir. 1991). In this case, the Court declines to retain jurisdiction over Plaintiffs' state law negligence claim. The Court also notes that Plaintiffs have not alleged any independent basis for jurisdiction over the remaining state law claim. Plaintiffs allege no other basis for federal question jurisdiction, and nothing in the Complaint indicates that there is complete diversity. Therefore, the Court elects not to address Walden's Motion for Summary Judgment as to this claim and hereby DISMISSES this claim WITHOUT PREJUDICE to refiling in state court.

V. CONCLUSION

For the foregoing reasons, the Court hereby GRANTS both Motions for Summary Judgment and GRANTS SUMMARY JUDGMENT on all claims to ALL DEFENDANTS.

IT IS SO ORDERED.

DATED: September 2, 1997 LOURDES G. BAIRD
United States District Court

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
CLERK, U.S. DISTRICT COURT
SEP 4 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

FILED
CLERK, U.S. DISTRICT COURT
SEP 2 1997
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

JOSE ORTIZ et al.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES et al.,

Defendants.

CV 96-1093 LGB (Mcx)

JUDGMENT

The Court hereby ORDERS, ADJUDGES, and DECREES that judgment be and hereby is entered IN FAVOR OF DEFENDANTS, the County of Los Angeles, Sheriff Sherman Block, John Mayfield, David Bower, David Moore, Gil Garcetti, District Attorney for the County of Los Angeles, and Walden Environment,

Inc., and AGAINST PLAINTIFFS, Jose Ortiz, Aida Ortiz, Generoso Morales, and Aida Morales, as to Plaintiffs' Complaint.

IT IS SO ORDERED.

DATED: September 2, 1997

LOURDES G. BAIRD
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
JUL 21 1997
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

JOSE ORTIZ; AIDA ORTIZ; et al.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES et al.,

Defendants.

CV 96-1093 LGB (Mcx)

DECLARATION OF DAVID MOORE

I, DAVID MOORE, declare as follows:

1. I am a Deputy Sheriff with the Los Angeles County Sheriff's Department and I have been so employed for the last eleven years. The matters set forth in this declaration are of my own personal knowledge and if called upon to do so, I could and would competently testify as follows:

2. On February 14, 1995, I was requested by Deputy Tania Bower to proceed to 1107 West Avenue

P-14 in Palmdale to arrest Jose Israel Ortiz for violations of Penal Code, Sections 261(a)(2) and 288(a). Deputy Tania Bower advised that Jose Israel Ortiz was at the location and was a named rape suspect from a call she was currently handling.

3. On the evening of the arrest of Jose Israel Ortiz, I was assigned to a patrol car in the City of Palmdale. I understood from Deputy Bower, that Mr. Ortiz resided in Palmdale.

4. I arrived at the location with assisting units, Deputy David Bower and Sgt. Richard Gurr.

5. I knocked on the front door of the location. The door was answered by a female who I determined to be Aida Ortiz. I asked if Mr. Ortiz was home and she indicated that he was and invited us into their home. Our entry was through consent of Mrs. Ortiz. Aida Ortiz directed us to Jose Israel Ortiz who was asleep in his room. Mr. Ortiz awoke and identified himself as Jose Israel Ortiz. He was subsequently arrested for the above Penal Code violations.

6. As I was advising the suspect of his arrest, he spontaneously stated, "Yes, I heard what she's been saying and I can't believe it, it is all false."

7. Deputy Tania Bower had also advised that she wanted to impound the suspect's vehicle for evidence. I asked Aida Ortiz where the suspect's vehicle was and she told us that it was in the garage. She opened the garage door and gave us the key to the vehicle.

8. Deputy David Bower impounded the vehicle.

9. I transported Mr. Ortiz to the Antelope Valley Sheriff's Station and booked him on the indicated charges with the approval of the Watch Sergeant and Watch Commander.

10. At no time did I personally interview the

alleged victim of the crime, Dianna Naranjo. I was not present at the Antelope Valley Hospital during the interview of Ms. Naranjo by Deputy Tania Bower.

11. My conduct in placing Jose Israel Ortiz under arrest was pursuant to official information from another deputy sheriff and a request based upon her interview and events at the hospital that I understand caused her to reasonably believe there was probable cause for the arrest of Mr. Ortiz.

12. At no time did I act with any malice or wanton disregard toward Mr. or Mrs. Ortiz. Neither did I act with deliberate indifference to the constitutional rights of any plaintiff.

13. After I booked Mr. Ortiz at the Station, I prepared a Supplemental Report providing information on my conduct at the Ortiz home. I submitted this report. I had no further activity nor involvement in this case. A true and correct copy of my Supplemental Report is attached as Exhibit "D".

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 14th day of July, 1997 at Lancaster, California.

David Moore
Declarant

-D 4-

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 4 1997
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

JOSE ORTIZ; AIDA ORTIZ; et al.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES et al.,

Defendants.

CV 96-1093 LGB (Mcx)

DECLARATION OF JOSE ISRAEL ORTIZ

I, JOSE ISRAEL ORTIZ, do hereby declare:

1. I am a plaintiff in the instant action and make this declaration in support of plaintiffs' opposition to the motions for summary judgment by the County defendants and Walden Environment, Inc. ("Defendants").

2. On Friday, July 18, 1997, the defendants took my deposition, a correct copy of which is being filed under separate cover as Exhibit "A".

3. I am submitting my complete testimony given

in the deposition as evidence in opposition to defendants' instant motions for summary judgment.

4. I was the defendant in the case entitled *People of the State of California v. Jose Ortiz*, Case No. MA-009713 related to charges by Deanna Naranjo that I sexually molested her on the night of February 10, 1995.

5. I have always maintained my absolute innocence of the charges as I testified in my deposition and as I maintained from the inception of the underlying prosecution against me.

6. I was arrested on February 14, 1995 at approximately 11:30 p.m. at my residence located at 1107 West Avenue, P-14, Palmdale, CA by the County Sheriff's Department.

7. Residing in the house at the time were my wife, Aida Ortiz and three children.

8. At the time of my arrest I was sleeping in my bedroom and first became aware that deputy sheriffs were present in my house when I was awakened by my wife and a deputy sheriff standing next to my bed.

9. I never heard a knock at the front door or a doorbell ringing before I was awakened.

10. The deputy sheriff who was with my wife next to my bed stated that I needed to accompany him to the station at which point after I put my cloths on, I was turned around and handcuffed and walked outside to the patrol car and taken to the sheriff's station and booked at the Lancaster station.

11. At no point during the course of the arrest was I told why I was being arrested except on the way to the Lancaster station, I told by the driver of the patrol car that I was being arrested for allegations of child molestation.

12. The County Sheriffs never presented me with

an arrest warrant.

13. I was never told that evening by anyone that the Sheriffs were going to seize as evidence my vehicle which was locked at the time of my arrest in an adjacent closed garage.

14. The County Sheriffs never presented me with a search warrant.

15. My arrest that evening and the search and seizure of my vehicle were done without my consent.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 3rd day of August, 1997 at Pacoima, California.

JOSE ISRAEL ORTIZ

-D 7-

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
AUG 4 1997
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY CLERK

JOSE ORTIZ; AIDA ORTIZ; et al.,

Plaintiffs,

v.

COUNTY OF LOS ANGELES et al.,

Defendants.

CV 96-1093 LGB (Mcx)

DECLARATION OF AIDA LUZ ORTIZ

I, AIDA LUZ ORTIZ, do hereby declare:

1. I am a plaintiff in the instant action and make this declaration in support of plaintiffs' opposition to the motions for summary judgment by the County defendants and Walden Environment, Inc. ("Defendants").

2. On Friday, July 25, 1997, the defendants took my deposition, a correct copy of which is being filed under separate cover as Exhibit "B".

3. I am submitting my complete testimony given

in the deposition as evidence in opposition to defendants' instant motions for summary judgment.

4. I am the wife of plaintiff JOSE ISRAEL ORTIZ.

5. When the County Sheriffs appeared on February 14, 1995 at approximately 11:30 a.m. at the front door of our residence located at 1107 West Avenue, P-14, Palmdale, CA, they said they needed to talk to Israel.

6. I was never told that they were coming to arrest Israel nor did I consent to allow them to enter to arrest Israel.

7. The County Sheriffs never presented me with an arrest warrant for Israel and I was never presented with a search warrant for the vehicle which was seized.

8. I was startled at having law enforcement officers come to my home at such a late hour, and especially startled when I saw their guns out of their holsters after they initially entered the home.

9. The late hour at which the Sheriffs arrived at my home frightened me and caused me to believe that I could not refuse them entry to my home to speak to Israel.

10. This fact was reinforced by the fact that their guns were drawn when they first entered and at that point I did not want any violence to occur.

11. After the Sheriffs arrested Israel, I did not believe that I could refuse them entry to the garage to view and seize the vehicle.

12. I was never presented by any of the Sheriffs that evening with an arrest warrant for Israel or a search warrant for the vehicle.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct.

Executed this 3rd day of August, 1997 at Pacoima, California.

AIDA LUZ ORTIZ

(2)

No. 99-711

Supreme Court, U.S.
FILED
NOV 24 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

JOSE ORTIZ, AIDA ORTIZ,

Petitioners,

vs.

COUNTY OF LOS ANGELES, SHERIFF SHERMAN BLOCK, TERRY BOWER AND DAVID MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

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9 pp

STATEMENT OF PARTIES

Petitioners' *LIST OF PARTIES TO THE PROCEEDING* misstates the identity of the parties as follows:

The Complaint caption named a defendant as "Terry" Bower, for which there is no known person identified to this action. David Bower was served as a defendant, appeared, is a Respondent, and at all times herein mentioned is the correct name of the party identified throughout the *Petition for Writ of Certiorari* as Terry Bower.

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JURISDICTION

This Honorable Court's jurisdiction on a writ of certiorari is enumerated in Rule 10 of the Rules of the Supreme Court of the United States. It is clearly stated "A petition for a writ of certiorari will only be granted for compelling reasons." Respondent asserts herein that the issue raised in the petition is not an issue of great legal importance and there is no compelling reason to grant the within Petition and it therefore should be denied.

STATEMENT OF THE CASE

On July 21, 1997, Defendants County of Los Angeles, Sheriff Sherman Block, District Attorney Gil Garcetti, Deputy Sheriffs John Mayfield, David Moore and David Bower filed a Motion for Summary Judgment on all counts. On September 4, 1997, the District Court issued an Order Granting Defendants' Motion for Summary Judgment as to Respondents County of Los Angeles, Sheriff Sherman Block, Deputy Sheriffs David Moore and David Bower. On October 1, 1997, Petitioners timely filed a Notice of Appeal from the Order and Judgment. On June 16, 1999, the 9th Circuit Court of Appeals affirmed the District Court Order and Judgment. Petitioners filed a Petition for Rehearing which was denied on July 27, 1999. Petitioners timely filed the instant Petition for Writ of Certiorari on October 25, 1999.

The 1983 Complaint alleges violations of the Fourth, Fifth, Sixth and Fourteenth Amendments. The Complaint alleges that Petitioner Jose Ortiz was arrested without probable cause, that the Fourth Amendment rights of Petitioners Jose and Aida Ortiz were violated by an unlawful entry into their home to effect the arrest of Petitioner Jose Ortiz. Petitioners further alleged a *Monell* claim by stating that conduct of the individual Respondents was according to "official policy, custom and practice of the County."

The single issue raised by this Petition is whether the warrantless arrest of Petitioner Jose Ortiz violated the 4th Amendment of the United States Constitution.

ARGUMENT

I
THERE IS NO JURISDICTIONAL BASIS FOR THE SUPREME COURT TO GRANT REVIEW OF FACTUAL DETERMINATIONS MADE BY THE DISTRICT COURT AND UPHELD BY THE 9TH CIRCUIT COURT OF APPEALS.

A. THE CIRCUIT COURT OF APPEAL DECISION DOES NOT CONFLICT WITH DECISIONS BY THIS COURT.

Petitioners urge this Court to grant review on the basis of the recent decision in *Wilson v. Layne*, 526 U.S.603; 119 S. Ct. 1692; 143 L.Ed.2d 818 (1999). The *Wilson* decision squarely rests on the issue of "scope" of a search pursuant to a validly issued search warrant. Petitioners argue herein that the reasoning in *Wilson* as it pertains to the issue of "scope" should have been applied by the 9th Circuit Court of Appeals in reviewing the issue of "scope of consent" as it pertains to a warrantless entry into a residence.

Petitioners' argument, however, begs the most basic fact that consent is an exception to the warrant requirement. The 9th Circuit Court of Appeals plainly held that absent evidence that consent was a product of coercion or duress, the deputies' entry into the residence was lawful and not violative of the 4th Amendment of the United States Constitution.

B. THERE IS NO ISSUE OF CONFLICTING CIRCUIT OPINIONS.

There are no conflicting circuit opinions on the issue of the scope of consent as applied to an exception to the warrant requirement.

II

PETITIONERS' WRIT ASSERTS ERRONEOUS FACTUAL DETERMINATIONS BY THE DISTRICT COURT AS UPHELD BY THE COURT OF APPEALS.

A. THE ISSUE OF CONSENT IS A FACTUAL DETERMINATION UNSUITABLE FOR REVIEW IN THE SUPREME COURT.

In *Thompson v. Louisiana*, 469 U.S.17, 23; 105 S. Ct. 409; 83 L. Ed. 2d 246 (1984) this honorable Court held that "the issue of consent is ordinarily a factual one unsuitable for our consideration in the first instance."

The issue of consent is to be measured against the standards of *United States v. Matlock*, 415 U.S. 164; 94 S. Ct. 988; 39 L. Ed. 2d 242 (1974) and *Schneckcloth v. Bustamonte*, 412 U.S. 218; 93 S. Ct. 2041; 36 L. Ed. 2d 854 (1973).

B. THE DISTRICT COURT FOUND THAT ARRESTING DEPUTY SHERIFFS HAD CONSENT TO ENTER PETITIONER'S RESIDENCE.

1. PETITIONER'S WIFE CONSENTED TO DEPUTIES' ENTRY.

The District Court found that "Plaintiffs concede that Aida Ortiz consented to the officers' entry." Pet.App.C 23 (2). [citations to supporting record omitted].

On review, the 9th Circuit Court of Appeals upheld the District Court's ruling, "The warrantless arrest of Jose Ortiz in his home did not offend the Constitution because his wife Aida Ortiz gave specific consent for the officers to enter the home. *See United States v. Shaibu*, 920 F.2d 1423, 1426 (9thCir.1990) (consent to enter home valid if 'there was no duress or coercion' and consent is 'unequivocal and specific' and 'freely and intelligently given')." Pet.App.A 3.

2. DEPUTIES ONCE LAWFULLY INSIDE PETITIONERS' RESIDENCE DID NOT VIOLATE THE 4TH AMENDMENT.

Petitioners asserted that the consent was limited in scope for the stated purpose "of speaking with Jose Ortiz, and not for the purpose of arresting him." Pet.App.C 24. The District Court stated (Petitioners) fail to cite any "authority for the proposition that police with probable cause may not arrest a suspect they find in a home which they have entered with consent."

C. THE SEIZURE OF PETITIONERS' VEHICLE WAS LAWFUL.

The District Court upheld the seizure of the car as incident to a lawful arrest and that it was suspected as being an instrumentality in the perpetration of the crime. "'The right without a search warrant contemporaneously to search person lawfully arrested while committing a crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or *as the means by which it was committed* is not to be doubted.' (quoting *Agnello vs. United States*, 269 U.S. 20, 30;46 S.Ct.4; 70 L.Ed.145(1925) (emphasis added))." Pet.App.C 25.

The Court of Appeals determined "no constitutional violation occurred when the police seized the Ortiz's vehicle. The vehicle was properly impounded, incident to a lawful arrest, as an instrumentality of the crime. *See United States v. Robinson*, 414 U.S. 218,225; 914 S. Ct. 467; 38 L.Ed.2d 427(1973)(instrumentality of the crime may be seized incident to a lawful arrest)." Pet.App.A 3.

CONCLUSION

For the above stated reasons, the Petition for writ of certiorari should be denied for want of a substantial federal question.

Respectfully submitted:

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